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Engquist and the Erosion of the Equal Protection Clause: An Attempt to Stop the Creep of Irrational Dicta

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Engquist and the Erosion of the Equal Protection Clause: An Attempt to Stop the Creep of Irrational Dicta

DARIEN SHANSKE*

This Article is about the erosion of the protections offered by the Equal Protection Clause resulting from the Supreme Court's decision in Engquist v. Oregon Department of Agriculture. Lower courts, purportedly following Engquist, have limited the reach of the Equal Protection Clause in several dozen cases in the last year. Until Engquist, it was uncontroversial that any person alleging irrational treatment by a government official could at least challenge the government official to give a reason that would satisfy rational basis review. Since the Supreme Court decided Engquist, lower courts have leapt to find that government officials cannot be found liable under the Equal Protection Clause for any action considered "discretionary." It would be problematic if this striking curtailment of individual rights was actually required by the Supreme Court's decision in Engquist, but the Court held no such thing, though the Court offered some expansive dicta that could be so interpreted. This Article aims to counter the creep of these dicta among the lower courts, and explains in particular why these dicta are not consistent with constitutional values.

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INTRODUCTION

I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus to escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take no better measure to assure that laws will be just than to require that laws be equal in operation.¹

Justice Jackson's point should be a truism as a matter of constitutional doctrine, but recent developments seriously undermine the vitality of the Equal Protection Clause. To understand what is at stake, I will begin with a nonhypothetical anecdote.

Suppose that I own a small restaurant. My profit margin is tight, entirely provided by the sale of wine. Every two years I must renew my liquor license with the city. I have now done so for twenty years—the process is quick and efficient. This year, the bureaucrat in charge of

1. *Ry. Express Agency v. New York*, 336 U.S. 106, 112–13 (1949) (Jackson, J., concurring).

renewing licenses is my old high school nemesis, who maliciously delays and then rejects my liquor license renewal. Every day I operate without a liquor license, I lose money.

Do I have a claim under the Federal Constitution against this government bureaucrat? The answer used to simply be “yes.” I could sue the bureaucrat in her personal capacity² under 42 U.S.C. § 1983 for violating my constitutional right to equal protection.³ Specifically, I could claim that her treatment of me was irrational, motivated solely by malice. Since in this example I have no argument that I was persecuted because of membership in a protected class (for instance, race or gender), I would proceed as a so-called “class of one,” and my claim would be tested under the lowest level of scrutiny—rational basis review. To be sure, such deferential review makes it unlikely that I will succeed in my claim.⁴ Still, as every lawyer knows, unlikely is not impossible.⁵

There would also be additional doctrinal hurdles. The defendant bureaucrat could claim qualified immunity, and thus even if he did violate my rights, I could not collect if he could show that what he did was objectively reasonable.⁶ This issue of qualified immunity must be addressed as early in the litigation as possible.⁷ What’s more, plaintiffs asserting that they were treated arbitrarily must generally establish a very high level of similarity with others treated differently.⁸ If my

2. See *Hafer v. Melo*, 502 U.S. 21, 25–31 (1991) (even state officials can be sued in their personal capacity under § 1983).

3. This is the holding of *Village of Willowbrook v. Olech*, 528 U.S. 562, 565 (2000), though as that case points out, this is essentially a reaffirmation of a much older principle, namely that all individuals, regardless of membership in a particular class, are entitled to equal protection of the law (as eloquently described by Justice Jackson above). See *id.* at 564; see also William D. Araiza, *Constitutional Rules and Institutional Roles: The Fate of the Equal Protection Class of One and What It Means for Congressional Power to Enforce Constitutional Rights*, 62 SMU L. REV. 27, 38–39 (2009) (doctrinal history); V.F. Nourse & Sarah A. Maguire, *The Lost History of Governance and Equal Protection*, 58 DUKE L.J. 955, 962–65 (2009) (same). Note that Nourse and Maguire ultimately argue for a return to a more robust equal protection analysis without discussion of the threat posed by the *Engquist* line of cases discussed herein.

4. See, e.g., *Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483 (1955) (classic example of weakness of rationality review).

5. See, e.g., *Romer v. Evans*, 517 U.S. 620, 632 (1996); see also Robert C. Farrell, *Successful Rational Basis Claims in the Supreme Court from the 1971 Term Through Romer v. Evans*, 32 IND. L. REV. 357 (1999). The famous remark of Justice Jackson on equal protection cited above is itself cited in another celebrated constitutional case seemingly decided on rational basis review. See *Lawrence v. Texas*, 539 U.S. 558, 585 (2003) (O’Connor, J., concurring). For more on the not-entirely-toothless nature of rational basis review, see discussion *infra* Part II.B.3–4.

6. See generally *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982) (description of qualified immunity).

7. See, e.g., *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (timing of analysis).

8. See, e.g., *Purze v. Village of Winthrop Harbor*, 286 F.3d 452, 455 (7th Cir. 2002) (“In order to succeed, the [plaintiffs] must demonstrate that they were treated differently than someone who is *prima facie* identical in all relevant respects.”).

restaurant is in a small town, then perhaps there are no other comparable restaurants.

And so there has long been clear equal protection doctrine that represented our constitutional values, namely that all are equal under the law. There has also been a long development of various legal doctrines that protected the courts from a feared flood of litigation if every government decision could be challenged as infringing on some person's right to equal protection. Using Mitchell Berman's helpful nomenclature, we can say that a relatively stable understanding of the Constitution as to the meaning of the Equal Protection Clause, an "operative proposition," has been shaped by a large series of "decision rules" that, in fact, make it difficult pragmatically to assert an equal protection claim in a class-of-one case.⁹

The difficulty of bringing a class-of-one case under these "decision rules" has a filtering-out effect on these cases, which is positive to the extent that we would not want every government action to open the door to liability. Yet it is also positive as a matter of political theory for these cases to be possible. It is a check on petty bureaucratic tyrants everywhere that they may be called to give public reasons for what they have done. Thus, despite the manifest difficulty of proceeding and the unlikelihood of winning, established equal protection doctrine used to stand unambiguously for the principle that I was entitled to a certain minimal level of rationality when interacting with government officials—and that I could enforce this entitlement in federal court.

So what has happened to throw this all in doubt? Lower federal courts have begun to hold that the so-called class-of-one equal protection theory is no longer viable whenever the challenged government action is "discretionary."¹⁰ The upshot of this new doctrine is that my cause of action for the events described above would be completely taken away because the malicious bureaucrat in my hypothetical was entrusted with discretion over liquor licenses. The courts that have embraced this implausible equal protection analysis have argued that they are following the Supreme Court's instructions in *Engquist v. Oregon Department of Agriculture*.¹¹

In this brief Article I argue first that these courts are incorrect as a matter of law as to the holding and rationale of *Engquist*. Second, I will

9. Mitchell N. Berman, *Constitutional Decision Rules*, 90 VA. L. REV. 1, 9–10 (2004).

10. The list of such courts is growing. See, e.g., *Flowers v. City of Minneapolis*, 558 F.3d 794, 799–800 (8th Cir. 2009); *United States v. Moore*, 543 F.3d 891, 900–01 (7th Cir. 2008); *Douglas Asphalt Co. v. Qore, Inc.*, 541 F.3d 1269, 1274 (11th Cir. 2008); *JDC Mgmt., LLC v. Reich*, 644 F. Supp. 2d 905, 910 (W.D. Mich. 2009); *Sloup v. Loeffler*, No. 05-CV-1766 (JFB) (AKT), 2008 WL 3978208, at *15–16 (E.D.N.Y. Aug. 21, 2008). But see *Hanes v. Zurick*, 578 F.3d 491, 494–95 (7th Cir. 2009) (critiquing creep of *Engquist*); *Franks v. Rubitschun*, No. 07-1181, 2009 U.S. App. LEXIS 4164, at *6–7 n.3 (6th Cir. Feb. 23, 2009) (same).

11. 128 S. Ct. 2146 (2008).

argue that this attempt to expand dicta from *Engquist* is misguided as a matter of theory and policy.

I. THE CASES AND THE CREEP

A. *ENGQUIST*

In *Engquist v. Oregon Department of Agriculture*, the plaintiff, an employee of the Oregon Department of Agriculture, sued her employer on a number of grounds, including that she was discriminated against on the basis of membership in a protected class, but also simply as a class of one.¹² After a jury trial, the plaintiff in *Engquist* won only on her class-of-one theory.¹³

As Justice Stevens noted in his dissent, plaintiffs will typically sue under more than one theory.¹⁴ Going a little further than Justice Stevens, one can surmise that the jury reached its conclusion in *Engquist* through the unfolding of the following dynamic: The plaintiff had to show intentional discrimination to prevail as a member of a protected class. This is hard to prove, though perhaps only because this kind of invidious discrimination has gotten more subtle,¹⁵ and apparently the plaintiff did not prove this point to the jury's satisfaction.¹⁶ It may have perhaps been easier to prove that, rather than having an invidious reason, the defendants had no reason at all for their actions. Although her protected-class claim failed, the plaintiff did successfully convince the jury on her class-of-one argument.¹⁷ Whether or not this accurately describes how the jury reached its verdict in *Engquist*, it is important to note the relationship between the class-of-one theory and other theories in equal protection cases; as elaborated upon later, the viability of a class-of-one claim provides plaintiffs with a viable cause of action when other theories of liability are foreclosed, whether by problems of proof or legal bars.

A divided panel of the Ninth Circuit reversed the judgment for *Engquist*, refusing to recognize as a matter of law a class-of-one theory in the public employment context.¹⁸ Recognizing a split among the circuit courts, the Supreme Court granted certiorari.¹⁹ Only the viability of the class-of-one theory was before the Supreme Court,²⁰ and the Court

12. *Id.* at 2149–50.

13. *Id.*

14. *Id.* at 2161 (Stevens, J., dissenting).

15. See Araiza, *supra* note 3, at 31.

16. See *Engquist*, 128 S. Ct. at 2149.

17. *Id.* at 2149–2150.

18. *Engquist v. Or. Dep't of Agric.*, 478 F.3d 985, 996 (9th Cir. 2007).

19. *Engquist*, 128 S. Ct. at 2150.

20. In fact, the grant of certiorari was only as to the application of the class-of-one theory to public employment. See Petition for Writ of Certiorari at i, *Engquist*, 128 S. Ct. 2146 (No. 07-474), 2007 WL 2962922 (Question 1 reads: "Whether traditional equal protection 'rational basis' analysis under

affirmed the Ninth Circuit, holding that “a ‘class-of-one’ theory of equal protection has no place in the public employment context.”²¹ The Supreme Court repeated several times that its holding was limited to the public employment context.²²

The reasoning of the Court explains why its holding was limited. The Court began its analysis by emphasizing that “we have long held the view that there is a crucial difference, with respect to constitutional analysis, between the government exercising ‘the power to regulate or license, as lawmaker,’ and the government acting ‘as proprietor, to manage [its] internal operation.’”²³ The Court then cited a long series of cases in which this distinction was relevant, particularly as to public employees in leading cases involving the First and Fourth Amendments.²⁴ The rationale for this doctrinal distinction is “the ‘common-sense realization that government offices could not function if every employment decision became a constitutional matter.’”²⁵ As the Court observed, “[t]o treat employees differently is not to classify them in a way that raises equal protection concerns. Rather, it is simply to exercise the broad discretion that typically characterizes the employer-employee relationship.”²⁶

Village of Willowbrook v. Olech applies to public employers who intentionally treat similarly situated employees differently with no rational bases for arbitrary, vindictive or malicious reasons?” (citation omitted)).

21. *Engquist*, 128 S. Ct. at 2148–49.

22. *See id.* at 2156 (“[We] conclud[e] that the class-of-one theory of equal protection has no application in the public employment context—and that is all we decide . . .”); *id.* at 2157 (“[R]atifying a class-of-one theory of equal protection in the context of public employment would impermissibly ‘constitutionalize the employee grievance.’” (quoting *Connick v. Myers*, 461 U.S. 138, 154 (1983))).

23. *Id.* at 2151 (alteration in original) (quoting *Cafeteria & Restaurant Workers Union, Local 473 v. McElroy*, 367 U.S. 886, 896 (1961)).

24. *Id.* (citing *O'Connor v. Ortega*, 480 U.S. 709, 721–22 (1987)); *id.* at 2152 (citing *Connick v. Myers*, 461 U.S. 138, 150–51 (1983)). The Supreme Court might also have added its dormant commerce clause jurisprudence, which treats governments differently whether they are acting as a market participant or a regulator, or its First Amendment property jurisprudence, where again the government is treated differently when acting as a landowner versus a regulator. *See, e.g., Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 678 (1992) (example of forum analysis in First Amendment context); *White v. Mass. Council of Constr. Employers, Inc.*, 460 U.S. 204, 214–15 (1983) (market participant exception to dormant commerce clause). Again and again, the rationale is the same: that the government must be allowed the leeway to organize its own internal affairs as it sees fit.

25. *Engquist*, 128 S. Ct. at 2151 (citing *Connick*, 461 U.S. at 143).

26. *Id.* at 2155. It is passages like this that I believe indicate that the Court is arguing that in public employment cases there simply is no violation and hence is offering an interpretation of the Equal Protection Clause. William Araiza disagrees and points to passages that indicate that the Court acknowledges the possibility of a violation, but emphasizes the practical impossibility of such violations being adjudicated by a court. *See Araiza, supra* note 3, at 69–70. I do not think there is much to be gained by arguing about nomenclature on this point given that, at the very least, the extreme decision rule adopted by the Court necessarily effects a change in constitutional meaning.

The analogy to the Supreme Court's recent decision in *Garcetti v. Ceballos* is particularly illustrative.²⁷ In *Garcetti*, the Court held "that when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and the Constitution does not insulate their communications from employer discipline."²⁸ As in *Engquist*, a central justification for this holding involved "the emphasis of [the Court's] precedents on affording government employers sufficient discretion to manage their operations. Employers have heightened interests in controlling speech made by an employee in his or her professional capacity."²⁹ The Court rejected the more nuanced view advanced by the Ninth Circuit and the dissent³⁰ on the grounds that such rules "demand permanent judicial intervention in the conduct of governmental operations to a degree inconsistent with sound principles of federalism and the separation of powers."³¹ In short, *Garcetti* illustrates that *Engquist* is part of a line of cases in which the Court has opted to free public employers from litigation over employment decisions that would not generate litigation in the private context.

Thinking of *Engquist* along with *Garcetti* also indicates that the *Engquist* decision is hardly indubitable. In particular, as the dissents (and commentators) have argued, if there is a particular problem with constitutional claims being made in the public employment context, then this problem can be solved by narrow doctrinal solutions—axing out entire types of claims from the law is excessive.³² But I will not dwell on the contestability of *Engquist* for two reasons. First, others have already

27. 547 U.S. 410, 426 (2006); see also Araiza, *supra* note 3, at 69–70, 77–78. It should be noted that labeling categorization as "conservative" and balancing as "liberal" would be too facile. See generally Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 317 (1992) ("Categorization and balancing are competing responses to analogical crisis. The choice between them cannot successfully be explained by general constitutional theory. Nor can the choice between them systematically determine outcomes. . . . If we are entering an era of increasing categorization to conservative ends, then it is predictable that liberal advocates will favor balancing approaches. But this is a contingent choice; balancing does not inherently favor rights, and balancing is second-best to categorization that favors rights.").

28. 547 U.S. at 421.

29. *Id.* at 422.

30. See, e.g., *id.* at 426 (Stevens, J., dissenting) ("The proper answer to the question 'whether the First Amendment protects a government employee from discipline based on speech made pursuant to the employee's official duties,' is 'Sometimes,' not 'Never.'" (citation omitted) (quoting *id.* at 413 (majority opinion))).

31. *Id.* at 423 (majority opinion).

32. Interestingly, Justice Breyer dissented from *Garcetti*, *id.* at 444 (Breyer, J., dissenting), though he proposed a narrower test than the main dissent, joined with the majority in *Engquist*, 128 S. Ct. at 2146, and wrote a short concurrence to the per curiam in *Village of Willowbrook v. Olech*, 528 U.S. 562, 565 (2002) (Breyer, J., concurring in result) (discussed below). This suggests, properly, that one's analysis of all three fact patterns might admit of important differences.

done so, and well.³³ Second, I want to emphasize that although *Engquist* is the law and thus binding on lower courts, as a matter of sound jurisprudence those courts should not, and indeed must not, expand the holding of *Engquist*.³⁴ Furthermore, although the Supreme Court will also presumably treat the holding of *Engquist* as settled, it ought not magnify the harm by following the lower courts who have expanded the reach of *Engquist*.

B. *OLECH*

The Court specifically harmonized *Engquist* with its earlier decision in *Village of Willowbrook v. Olech*.³⁵ The plaintiff in *Olech* was asked to provide a thirty-foot easement in return for connection with the municipal water supply when similarly situated landowners had only been asked to provide a fifteen-foot easement.³⁶ *Engquist* insisted that it did not disturb the “well settled” premises on which *Olech* relied, namely that the Equal Protection Clause protects individuals as well as groups and that it protects them when the state is acting administratively as well as legislatively.³⁷

It was on the basis of these premises that the Court had concluded in *Olech* that that plaintiff could state a claim under a class-of-one theory. The two tax cases relied on by the Court in *Olech* stand for a similar principle: the individual citizen is assured a minimal level of rationality when classified by government bureaucracies.³⁸ In short, as the Court put the heart of the matter in *Engquist*, “when it appears that an individual is being singled out by the government, the specter of arbitrary classification is fairly raised, and the Equal Protection Clause requires a ‘rational basis for the difference in treatment.’”³⁹

33. Most notably, there is Justice Stevens's dissent. See *Engquist*, 128 S. Ct. at 2157–61; see also Araiza, *supra* note 3 (critiquing in particular the analysis by which the Court reached its result, ignoring the subtle doctrines developed by lower courts). Notably, Richard Epstein filed an amicus brief on behalf of the plaintiff in *Engquist*. See Brief for Richard Epstein & the Rutherford Institute as *Amici Curiae* in Support of Petitioner at 16, *Engquist*, 128 S. Ct. 2146 (2008) (No. 07-474) (“The tradeoff therefore is this: Does this Court deny relief in rare cases of manifest and undisputed abuse because of the unproven fear of unlimited litigation? The correct answer to that question is not to slam the door, but to keep it ajar.”).

34. To be sure, to the extent one is convinced that *Engquist* itself was poorly reasoned, it (likely) follows that its error should not be extended.

35. 528 U.S. 562 (2000); *Engquist*, 128 S. Ct. at 2153. In fact, *Olech* came up over and over at oral arguments, and both sides insisted that they were not challenging it. See Transcript of Oral Argument at 21–22, 29, 52, *Engquist*, 128 S. Ct. 2146 (No. 07-474) (questions of Justice Kennedy). Furthermore, on my reading of the briefs and the many briefs of amici, none challenged *Olech*.

36. 528 U.S. at 563.

37. *Engquist*, 128 S. Ct. at 2150; *Olech*, 528 U.S. at 564.

38. See *Olech*, 528 U.S. at 564 (citing *Sioux City Bridge Co. v. Dakota County*, 260 U.S. 441 (1923); *Allegheny Pittsburgh Coal Co. v. County Comm'n*, 488 U.S. 336 (1989)); see also *Engquist*, 128 S. Ct. at 2154.

39. 128 S. Ct. at 2153 (quoting *Olech*, 528 U.S. at 564). As Judge Posner put it:

The *Olech* decision affirmed a Seventh Circuit opinion written by Judge Posner,⁴⁰ in which he relied on his earlier decision in *Esmail v. Macrane*.⁴¹ *Esmail* was the basis for the hypothetical with which I began this Article. In *Esmail*, the plaintiff had owned a liquor store for over ten years and had always had his liquor license renewed annually.⁴² *Esmail* was then told his original license (and his application for another license) would be rejected for reasons that *Esmail* contended would not have barred the renewal of the license of anyone else.⁴³

The denial of equal protection is alleged to lie in the mayor's having denied *Esmail*'s two license applications in 1992 on the basis of trivial or trumped-up charges while "maintain[ing] a policy and practice of routinely granting new liquor licenses as well as renewing existing licenses requested by persons who had engaged in the same or similar conduct, . . . for the sole and exclusive purpose of exacting retaliation and vengeance against" *Esmail*.⁴⁴

The Seventh Circuit found that *Esmail* had stated a claim under a class-of-one theory.⁴⁵

Given the developments of the doctrine, it is important to observe that the provision of liquor licenses is hard to characterize as merely "ministerial." The whole point of requiring a liquor license is to control who is distributing a potentially dangerous substance, and it was precisely these reasonable concerns with alcohol distribution that were allegedly manipulated by the defendants in *Esmail*.⁴⁶ The facts in *Esmail* also indicate another fact common to the business license scenario: a very significant reliance interest. *Esmail*'s store apparently primarily sold liquor; it had already been in existence for ten years⁴⁷ and presumably had an inventory, a long-term lease for its space (or a mortgage), regular employees, and the like. Presumably, a small business like this is very sensitive to a shock to its cash flow.

The holding of *Olech* seemed to recognize all of this, presumably satisfied that for the most part the decision rules noted above were a

[T]he fundamental insight of the class-of-one cases is that vicious or exploitative discrimination can sometimes be found even when the victim does not belong to a group that is a familiar target of such treatment. Indeed, a lone victim picked out for social or economic oppression or extinction can be especially vulnerable. Unlike the member of even a minority group, he has no allies at all.

Bell v. Duperrault, 367 F.3d 703, 712 (7th Cir. 2004) (Posner, J., concurring) (citation omitted).

40. *Olech v. Village of Willowbrook*, 160 F.3d 386, 387 (7th Cir. 1998).

41. 53 F.3d 176, 180 (7th Cir. 1995).

42. *Id.* at 177.

43. *Id.*

44. *Id.* at 178 (alterations in original).

45. *Id.* at 180.

46. *Id.* at 177.

47. *Id.*

sufficient filter against meritless claims.⁴⁸ After *Engquist*, the way to approach a class-of-one theory under the Equal Protection Clause should have been clear: all governmental action must at least pass muster under the rational basis test, unless the particular government action had to do with managing its own employees.

C. THE CREEP OF *ENGQUIST*

Nevertheless, some lower courts have already begun to expand *Engquist* beyond the public employment context into any area where the government exercises “discretion.”⁴⁹ The Seventh Circuit applied *Engquist* to probation decisions;⁵⁰ the Tenth and Eleventh Circuits to public contracting;⁵¹ the Eighth Circuit to police investigations.⁵² Although all of these expansions were unwarranted for the reasons discussed below, it has been district courts that have been most aggressive so far, expanding *Engquist* to apply to situations of traditional government regulation that strongly resemble the facts of *Olech* (landowner easement) and especially *Esmail* (liquor license).⁵³

According to several of these courts, to prevail on a class-of-one theory, a plaintiff must not only show arbitrarily different treatment from others similarly situated, but a plaintiff must also demonstrate “that the differential treatment received resulted from non-discretionary state action.”⁵⁴

48. Note the discussion of Justice Breyer’s concurrence *infra* note 91.

49. See Araiza, *supra* note 3, at 67–68 (predicting just this possibility based on the loose language of *Engquist*); Michael L. Wells & Alice E. Snedeker, *State-Created Property and Due Process of Law: Filling the Void Left by Engquist v. Oregon Department of Agriculture*, 44 GA. L. REV. 161 (2009).

50. *United States v. Moore*, 543 F.3d 891, 900–01 (7th Cir. 2008).

51. *Douglas Asphalt Co. v. Qore, Inc.*, 541 F.3d 1269, 1274 (11th Cir. 2008); *Pignanelli v. Pueblo Sch. Dist. No. 60*, 540 F.3d 1213, 1222 (10th Cir. 2008).

52. *Flowers v. City of Minneapolis*, 558 F.3d 794, 799–800 (8th Cir. 2009).

53. See, e.g., *Garber v. Flores*, No. CV 08-4208-DDP (RNB), 2009 U.S. Dist. LEXIS 48465, at *11–12 (C.D. Cal. June 10, 2009) (ticketing); *Crippen v. Town of Hempstead*, No. 07-CV-3478 (JFB) (ARL), 2009 U.S. Dist. LEXIS 24820, at *27–28 (E.D.N.Y. Mar. 25, 2009) (housing inspections); *Analytical Diagnostic Labs, Inc. v. Kusel*, No. 07 Civ. 3908(BMC) (RER), 2008 WL 4222042, at *3–5 (E.D.N.Y. Sept. 15, 2008) (laboratory license); *Bissessur v. Ind. Univ. Bd. of Trs.*, No. 1:07-CV-1290-SEB-WTL, 2008 WL 4274451, at *9 (S.D. Ind. Sept. 10, 2008) (educational placement). And now there is also a relatively full-throated and convincing defense of the expansive dicta in *Engquist* by Robert Farrell, one that also summarizes the creep of these dicta to other contexts. See Robert C. Farrell, *The Equal Protection Class of One Claim: Olech, Engquist, and the Supreme Court’s Misadventure*, 61 S.C. L. REV. 107 (2009). It is important to observe that though Farrell’s argument is flawed by my lights, it is also nuanced and in many ways consistent with the argument herein. Farrell does think there is a place for “selective enforcement”-type equal protection claims and he does think that the dicta in *Engquist* go too far. See *id.* at 122–23, 129. To the extent there is disagreement as to the limits of the class-of-one claim, I think in general that Farrell does not give enough credit to decision rules that protect discretion (like qualified immunity), nor does he give sufficient credit to the benefit of public reasons that justify a broader class-of-one-type claim being available. See *infra* Part II.B.3–4.

54. *Sloup v. Loeffler*, No. 05-CV-1766 (JFB) (AKT), 2008 WL 3978208, at *15–16 (E.D.N.Y. Aug. 21, 2008); see also *Siao-Pao v. Connolly*, 564 F. Supp. 2d 232, 245 (S.D.N.Y. 2008). See generally

To the extent that this innovation is argued for, it is said to arise from the following *Engquist* dictum:

There are some forms of state action . . . which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments. In such cases the rule that people should be “treated alike, under like circumstances and conditions” is not violated when one person is treated differently from others, because treating like individuals differently is an accepted consequence of the discretion granted. In such situations, allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise.⁵⁵

It cannot be denied that all of these courts are reasonable in surmising that this dictum suggests, contrary to the other parts of the opinion highlighted above,⁵⁶ that *Engquist* is to be read broadly, far more broadly than just another public employment decision. And, in fact, not just this dictum, but two other points made by the Court in this section of its opinion point in this direction.

First, the Court specifically (re)characterizes *Olech* and the two tax cases that preceded it as cases that involved a “clear standard.”⁵⁷ Take *Allegheny*, a case involving property tax assessments.⁵⁸ In that case, the county tax assessor consistently assessed certain properties at their acquisition value (that is, roughly what the property owner paid for them), but assessed others at their current fair market value.⁵⁹ However, state law required that *all* properties be assessed at current fair market value.⁶⁰ The assessor had conceded, foolishly, that there was no other difference between the properties assessed by one method and those assessed by the other—and even more damning was that only one of these methods was sanctioned by state law.⁶¹ *Allegheny* was not about the size of the disparities in assessment between similar properties because ultimately the Court would uphold such disparities under a similar system used by California in *Nordlinger v. Hahn*.⁶² The main proposition

Willets Point Indus. & Realty Ass’n v. City of New York, No. 08-cv1453 (ERK) (JO), 2009 WL 4282017, at *8 (E.D.N.Y. Nov. 25, 2009) (“While the Second Circuit has yet to rule on the issue, district courts have almost universally extended the *Engquist* reasoning to all class-of-one claims, such that successful plaintiffs now must additionally establish that the differential treatment was a result of *non-discretionary* state action.”).

55. *Sloup*, 2008 WL 3978208, at *16 (alteration in original) (quoting *Engquist v. Or. Dep’t of Agric.*, 128 S. Ct. 2146, 2154 (2008)).

56. *See supra* Part I.A.

57. *See Engquist*, 128 S. Ct. at 2153. I say “recharacterize” because in none of these earlier cases did the Court suggest there was anything but a pragmatic benefit to the clear numbers before it.

58. *See* 488 U.S. 336 (1989).

59. *Id.* at 338.

60. *Id.* at 338, 345.

61. *See generally* William Cohen, *State Law in Equality Clothing: A Comment on Allegheny Pittsburgh Coal Company v. County Commission*, 38 UCLA L. REV. 87 (1990).

62. 505 U.S. 1, 18 (1992).

that *Allegheny* seems to stand for is a concern with the “aberrational enforcement policy” of a local government official,⁶³ which was exactly the concern of the *Olech* Court. In fact, this concern with individual officials is also manifest in the (related) exactions context. The intermediate scrutiny of *Nollan/Dolan* applies when an official or local adjudicatory body of the sort at issue in *Olech*, *Allegheny*, or *Esmail*, requires a particular action from an individual landowner as a condition for obtaining a land-use permit.⁶⁴ Furthermore, as noted above, the whole structure of § 1983 litigation—in which states cannot be sued but their individual officials can be—also signals a particular concern with individual discretion gone astray.

Nevertheless, *Engquist* digs deeper into the facts of *Allegheny* and observes accurately that *Allegheny* did not revolve around the myriad disputes that reasonable people might have about the valuation of property; again, the defendant assessor had conceded that there was no relevant difference between the properties assessed by different methods. This stipulation, which certainly made adjudication of the legal question in *Allegheny* easier, is emphasized by the dictum in *Engquist*. That is, according to *Engquist*, the holding of *Allegheny* was not simply that all similar property owners must be assessed similarly, but that the only property owners who could state a claim under the Equal Protection Clause were those who could show divergence from a “clear standard.”⁶⁵

In this same section of *Engquist*, the Court also offered a much cited and problematic hypothetical:

Suppose, for example, that a traffic officer is stationed on a busy highway where people often drive above the speed limit, and there is no basis upon which to distinguish them. If the officer gives only one of those people a ticket, it may be good English to say that the officer has created a class of people that did not get speeding tickets, and a “class of one” that did. But assuming that it is in the nature of the particular government activity that not all speeders can be stopped and ticketed, complaining that one has been singled out for no reason does not invoke the fear of improper government classification. Such a complaint, rather, challenges the legitimacy of the underlying action itself—the decision to ticket speeders under such circumstances. Of course, an allegation that speeding tickets are given out on the basis of race or sex would state an equal protection claim, because such discriminatory classifications implicate basic equal protection concerns.

63. See 488 U.S. at 344 n.4.

64. See *Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 546 (2005) (reiterating that *Nollan/Dolan* analysis only applies to “land-use exactions,” at least so far); see also *Nollan v. Cal. Coastal Comm’n*, 483 U.S. 825 (1987); *Dolan v. City of Tigard*, 512 U.S. 374, 385 (1994) (emphasizing that the challenged decision was adjudicative).

65. *Engquist v. Or. Dep’t of Agric.*, 128 S. Ct. 2146, 2153 (2008). If the Court had been focused on this issue, it might have noted the perverse incentives that such a doctrine creates for local government officials—so long as they are unclear, for instance, about the usual size of easements, then their discretion protects them.

But allowing an equal protection claim on the ground that a ticket was given to one person and not others, even if for no discernible or articulable reason, would be incompatible with the discretion inherent in the challenged action. It is no proper challenge to what in its nature is a subjective, individualized decision that it was subjective and individualized.⁶⁶

The biggest problem here is with the phrase “no discernible or articulable reason.” As Justice Stevens points out, this cannot mean what it seems like it means, namely that there can be no equal protection claim even if the ticket was issued for no reason at all; for instance, the speeder must at least have been speeding or this would be a Fourth Amendment violation.⁶⁷ Furthermore, as Justice Stevens also notes, this phrase obscures the reality that there are excellent reasons why only some speeders get tickets (because of limited police resources, because only some speeders can be pursued safely, etc.).⁶⁸ So rather than being wholly exempt from equal protection analysis by reason of the officer’s discretion in issuing tickets to speeders, the officer’s issuance of a ticket in a particular case could easily pass rational basis review. In short, this is a useless example if thought through carefully.

Again, consider the facts in *Esmail*. If a town had decided that it would only issue ten liquor licenses in order to control the sale of liquor and that they would be auctioned off randomly, then Mr. Esmail would have no claim should he not get a license, even if in an odd way it would be true that he was denied his license for “no reason.” He would be like the unlucky speeder—in other words, denying Esmail the license could be justified on the rational basis that this was a fair distribution of a resource reasonably limited on grounds of public policy. But Esmail’s claim is not analogous to that of the unlucky speeder. Instead, his claim is that he was not speeding at all (i.e., he was following applicable regulations and was still harmed), or perhaps that the officer literally followed him around for days and gave him a ticket every moment he went even one mile above the speed limit, no matter what the situation and no matter what other motorists were doing (i.e., he was specifically targeted for discriminatory action). Or, more clearly still, as to Esmail’s claim of a liquor license, his reliance interest makes his case even more disanalogous to that of an unlucky speeder. If we assume that Esmail poured significant capital into his business on the (reasonable) belief that his business licenses would be adjudicated reasonably, then the arbitrary or malicious denial of those licenses—resulting in the loss of at least part of his investment—severely damages his reliance interest in the even-handed administration of the town’s licensing scheme. This is clearly

66. *Id.* at 2154.

67. *Id.* at 2159–60 (Stevens, J., dissenting).

68. *See id.*

problematic in ways different from a cop giving out tickets to unlucky speeders.

II. WHY *ENGQUIST* SHOULD NOT BE BROADENED

A. POOR AND IMPROPER JURISPRUDENTIAL METHOD

Nevertheless, the general rhetorical force of the broad dicta in *Engquist* must be conceded. Setting aside the arguments above and below about why these dicta are ill-advised, we must begin by remembering that they are dicta. The holding of *Engquist* is only as to public employment. For a lower court to expand *Engquist* and overturn *Olech*, thus fundamentally changing equal protection law, would be error.

Most obviously, this is because dicta, even Supreme Court dicta, cannot be allowed to trump a holding. Making such dicta law is tantamount to legislation.⁶⁹ Further, these dicta seem to be of a most virulent sort. Dicta are most dangerous when they represent vaguely plausible notions about a much harder case not before the Court. That is, the entire focus of the Justices, the parties, and the amici in *Engquist* was on the public employment context.⁷⁰ No one suggested overturning *Olech*, and much less was there any consideration of a much harder case like *Esmail*. As Judge Leval might put it, this dicta was not paid for by the Court.⁷¹ In fact, Judge Reinhardt mischievously notes as much in his dissent from the Ninth Circuit opinion in *Engquist*, the decision that the Supreme Court affirmed in denying there can be a class of one in the public employment context. Judge Reinhardt observes that Judge Tashima, the author of the Ninth Circuit opinion affirmed by the Court in *Engquist*, applied the conventional class-of-one analysis in another case involving traditional regulation.⁷² Actually confronted with the specter of arbitrary government action, this judge, like the Justices in *Olech*, was (wisely) unwilling to pay the price to foreclose the plaintiff's cause of action. Further evidence that this dicta was not thought through is easy to come by, as demonstrated below.

B. OTHER PROBLEMS WITH THE EXPANSION OF THE *ENGQUIST* RULE

There are many problems with the expansion of *Engquist*, but before continuing to attack the expansion as such, it is important to

69. See Pierre N. Leval, *Judging Under the Constitution: Dicta About Dicta*, 81 N.Y.U. L. REV. 1249, 1260 (2006) ("Courts make law only as a consequence of the performance of their constitutional duty to decide cases. They have no constitutional authority to establish law otherwise.").

70. See generally *id.* at 1261–63.

71. See *id.* at 1262–63.

72. See *Engquist v. Or. Dep't of Agric.*, 478 F.3d 985, 1013–14 (9th Cir. 2007) (Reinhardt, J., dissenting) (citing *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936 (9th Cir. 2004)).

observe that this expansion is unnecessary to achieve the legitimate goal of safeguarding a zone for officials to act. This lack of necessity is itself a sure sign that this dicta was not thought through.

1. *Arbitrary Expansion of Official Immunity*

The Supreme Court has long emphasized that it does not want constitutional litigation to chill the use of legitimate discretion by government officials. However, this is why officials sued in their individual capacity are *already* shielded by some form of immunity. As a general matter, legislators, prosecutors, and judges enjoy absolute immunity in connection with their official functions.⁷³ “For executive officials in general, however, . . . qualified immunity represents the norm.”⁷⁴ The test for qualified immunity is objective,⁷⁵ and, if the defense of qualified immunity is raised, it must be addressed “at the earliest possible stage in litigation.”⁷⁶ Qualified immunity is specifically meant to protect executive officials acting within their discretion.⁷⁷

Returning to the traffic officer from the *Engquist* hypothetical, we see that he was already protected by qualified immunity. If he had good reason to believe the driver was speeding, then the enforcement choice of the officer would be protected by this significant series of decision rules.⁷⁸ However, the lower courts seem to believe that the hypo indicates that any *category* of decisions resembling that of the officer is simply unreviewable. If this is so, then what *Engquist* has essentially done is grant absolute immunity against equal protection claims to any official wielding discretion as to a member of a non-protected class (or even as to a member of a protected class so long as the official does not intentionally discriminate because of membership in that class). This expansion seems hard to justify given that the officer’s legitimate

73. *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982).

74. *Id.* at 815.

75. *See id.* at 817–18.

76. *Pearson v. Callahan*, 129 S. Ct. 808, 815 (2009) (quoting *Hunter v. Bryant*, 502 U.S. 224, 227 (1991)).

77. *Harlow*, 457 U.S. at 816.

78. And this is far from the only protective decision rule. Most obviously, the government is protected by the rational basis standard. Governments are also now protected by rising pleading requirements. *See Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009). It is true that local government entities themselves do not have qualified immunity. *See Owen v. City of Independence*, 445 U.S. 622, 638 (1980). However, a long series of § 1983 cases has limited the zone of liability for local governments under a *Monell* theory. *See Monell v. Dep’t of Soc. Servs.*, 436 U.S. 658 (1978). Government entities cannot be held liable under § 1983 under a simple respondeat superior theory and a positive decision (usually decisions) made by a decisionmaker must usually be shown to have caused a plaintiff’s injury in a very strong sense of “cause.” *See, e.g., City of St. Louis v. Praprotnik*, 485 U.S. 112 (1988); *Bd. of the County Comm’rs v. Brown*, 520 U.S. 397 (1997). The exercise of discretion within an official’s authority is thus unlikely to cause liability for the entity that employs that official.

discretion is already protected, but this is only the beginning of the trouble.

2. *Is "Discretion" Itself a Clear (or Desirable) Standard?*

One feature of the Court's jurisprudence in *Engquist* and *Garcetti* is a preference for bright-line rules. Certain kinds of claims are not just made more difficult, but are categorically excluded by such rules. On the surface, the expansion of the *Engquist* dicta looks like more of the same. To the contrary, however, if the rule were that an *Olech* (i.e. class-of-one) claim would lie only when there was a "clear standard," then litigants would engage in significant collateral litigation as to whether or not there was such a "clear standard." Hence, far from setting forth an efficient bright line rule limiting officials' liability for alleged equal protection violations, expanding the *Engquist* dicta would merely force courts to address time-consuming and uncertain collateral issues.

There is a long history of significant—and difficult—jurisprudence concerning whether a government function is discretionary. Crucially, this distinction has long been relevant to municipal tort liability under state law,⁷⁹ federal due process cases,⁸⁰ and federal tort liability under the Federal Tort Claims Act.⁸¹ If the new rule were that there can be no equal protection claim in an area of "discretion," then this would spur still more litigation in this area. Not surprisingly, there is no consensus as to when official acts are "discretionary."⁸² Even if that issue were settled,

79. See, e.g., CAL. GOV'T CODE § 820.2 (West 1995); 745 ILL. COMP. STAT. ANN. 10/2-201 (West 2002); 42 PA. CONS. STAT. ANN. § 8546 (West 2007).

80. This is because plaintiffs must demonstrate a protected property interest in order to show a violation of the Due Process Clause. See *Bd. of Regents v. Roth*, 408 U.S. 564, 579 (1972) (property interest requirement). Thus, in my liquor license hypothetical, I could not allege a violation of procedural or substantive due process without a showing that I had a property interest in my license, and this I could not do if the government official in charge of dispensing the license had discretion as to whether or not to give me the license. Compare *Harlen Assocs. v. Incorporated Village of Mineola*, 273 F.3d 494, 504–05 (2d Cir. 2001) (typical case finding no property interest), with *Wedges/Ledges of Cal., Inc. v. City of Phoenix*, 24 F.3d 56, 62–64 (9th Cir. 1994) (finding property interest in licenses). The result of including "discretion" in the Equal Protection Clause is thus to make even more hinge on the fraught question of discretion. See *Fields v. Village of Sag Harbor*, No. 05-20949, 2007 WL 2236393, at *5 (N.Y. Sup. Ct. June 18, 2007) (dismissing complaint based on Due Process Clause because the government defendants had discretion, but allowing plaintiff's suit to proceed on equal protection claim under *Olech*). To be sure, Wells & Snedeker, *supra* note 49, at 165, are correct to argue that a rigorous due process analysis (i.e., a narrow definition of discretion) could revive many of the claims undermined by *Engquist* and its creep. Yet it is hard to imagine the same Court that emasculates the Equal Protection Clause undertaking such a project.

81. See 28 U.S.C. § 2680(a) (2006).

82. See, e.g., 18 EUGENE McQUILLIN, *THE LAW OF MUNICIPAL CORPORATIONS* § 53.04.10 (3d ed. 2003).

Stating the reasons for the discretionary-ministerial distinction is much easier than stating the rule. First, the difference between "discretionary" and "ministerial" is artificial. An act is said to be discretionary when the officer must exercise some judgment in determining whether and how to perform an act. The problem is that "[i]t would be difficult to conceive of any official act, no matter how directly ministerial, that did not admit of some

however, and the Supreme Court believed that as a matter of policy “discretion” should replace or supplement other procedural aspects of constitutional litigation, the Court should do so by tinkering with the decision rules that it has slowly crafted through common law development (such as qualified immunity).⁸³ But it should not graft this new rule onto the Constitution itself—if for no other reason than the Court should not tie actual legislators’ hands. Again, the expansion of the *Engquist* rule means that class-of-one claims are not cognizable under the Constitution’s Equal Protection Clause. This expansion would be a substantive limitation on the scope of the Clause itself, not a decision rule, and hence would not be a rule that Congress could correct through legislation.

Nevertheless, it might be objected that the *Engquist* dicta should be expanded as a substantive limitation on equal protection claims because discretion jurisprudence barring liability already exists and is fairly functional—which is why it is generally a feature of tort claims statutes.⁸⁴ Thus, the fact that federal and state governments have explicitly chosen to give themselves (and their subdivisions) this protection under tort law statutes and enjoy similar protection against due process claims as a matter of federal constitutional law, can be argued to imply that such protection should extend to class-of-one equal protection claims. So let us assume at this point that the *Engquist* dicta is properly expanded such

discretion in the manner of its performance, even if it involved only the driving of a nail.”

Id. (footnote omitted) (quoting *Ham v. Los Angeles County*, 189 P. 462 (Cal. Dist. Ct. App. 1920)). The Supreme Court’s own attempts to clarify the meaning of discretion in connection with the Federal Tort Claims Act have hardly resulted in a clear (or uncontroversial) jurisprudence. *See United States v. Gaubert*, 499 U.S. 315, 324–25 (1991) (articulating the latest version of the analysis: “When established governmental policy . . . allows a Government agent to exercise discretion, it must be presumed that the agent’s acts are grounded in policy when exercising that discretion . . . The focus of the inquiry is not on the agent’s subjective intent in exercising the discretion conferred by statute or regulation, but on the nature of the actions taken and on whether they are susceptible to policy analysis.”); *see also* James R. Levine, Note, *The Federal Tort Claims Act: A Proposal for Institutional Reform*, 100 COLUM. L. REV. 1538, 1541 n.21 (2000) (“Most analysis of the discretionary function exception concerns its judicial interpretation. As predicted in an article written for this journal just after the FTCA was passed, government tort liability has evolved ‘through case-by-case analysis,’ much like ‘[t]he development of the private law of torts.’” (alteration in original) (quoting Walter Gellhorn & C. Newton Schenck, *Tort Actions Against the Federal Government*, 47 COLUM. L. REV. 722, 740 (1947))).

83. On the shared doctrinal origins of qualified immunity and the discretionary action exception, *see*, for example, Mark C. Niles, “*Nothing but Mischief*”: *The Federal Tort Claims Act and the Scope of Discretionary Immunity*, 54 ADMIN. L. REV. 1275, 1280 (2002).

The preclusion of liability for “discretionary” government acts imposed by the exception was founded on the traditional restrictions (commonly referred to by courts as “absolute” or “qualified” governmental immunity) which were developed by American courts in response to common law claims filed against government officers in the course of their official duties.

Id. (footnote omitted).

84. *See, e.g.*, CAL GOV’T CODE § 820.2; *supra* notes 79–81.

that in class-of-one equal protection claims liability is barred for “discretionary” actions by officials (in addition to the bar already applicable in federal due process claims and in claims under the Federal Tort Claims Act). In a case like *Esmail* or *Olech*, it would seem likely that the plaintiff’s suit would fail in a state whose tort law also bars liability for discretionary acts, since there would be no un-barred theory to serve as a basis for imposing liability.⁸⁵ This would leave the plaintiff with no remedy for his injury, despite arbitrary government action.

The likelihood that any relief for an *Esmail*-type claim would be barred under state law (or due process jurisprudence) should more properly go *against* the expansion of *Engquist*, either by courts or by Congress.⁸⁶ Whether or not the various state laws barring liability relied on the continued viability of *Olech*-type claims (which would evidence a legislative intent to preserve or not to preserve a class-of-one remedy for injuries caused by discretionary actions by officials), the requirement that citizens have a right to expect a minimum of rationality from their local officials is inherent to our form of government, and is also just simply a good idea.⁸⁷ The fact that governments do not want to get sued should not undermine the fundamental constitutional values at issue.⁸⁸

Furthermore, despite the Court’s solicitude for the discretion of officials, the Court has built its § 1983 jurisprudence on the (reasonable) concern that it is appropriate for local governments to face greater liability under § 1983. My hypothetical picks up on this intuition in postulating a small community and a seemingly amateur bureaucrat. Furthermore, in the hypo, all of my capital is tied up in my restaurant, and I generally get by month-to-month. I am therefore especially vulnerable. Arguably, this spiteful official has discretion over these licenses; she must make a decision based on a set of criteria that we may or may not agree are “clear” (or tantamount to setting policy). Yet is it not because this official has this power over me that the law should be at least a little solicitous of me? It is not in dispute that the official is

85. *But see* *Genesis Env’tl. Servs. v. San Joaquin Valley Unified Air Pollution Control Dist.*, 6 Cal. Rptr. 3d 574, 583 (Ct. App. 2003) (finding equal protection theory viable under *Olech* even though no state-based theory survived).

86. And, again, this area of law is not pellucid. *See, e.g., Johnson v. State*, 447 P.2d 352, 357, 362 (Cal. 1968) (eschewing searching for a “semantic” or “mechanical” definition of “discretion” and “allowing immunity for basic policy decisions . . . but rejecting it for the ministerial implementation of that basic policy”). The emphasis of the California Supreme Court on policymaking is sensible and helpful in some cases, but in a case like *Esmail* it seems debatable whether the bureaucrat is making policy or merely implementing it. *See Hansen v. Cal. Dep’t of Corr.*, 920 F. Supp. 1480, 1501–02 (N.D. Cal. 1996) (finding defendants protected from § 1983 suit by qualified immunity, but not protected by California law protecting discretion).

87. *See infra* Part II.B.3–4.

88. For more on those values, *see infra* Part II.B.3–4.

protected by qualified immunity and will have her judgment reviewed under rational basis, but am I not entitled to at least that?

Again, as to exactions, the Supreme Court has been particularly concerned about private dealing by individual officials and boards. Justice Kennedy's controlling concurrence in *Kelo v. City of New London* expresses a similar concern about pretextual actions by government officials.⁸⁹ The landowners in *Olech* presumably had no argument for intermediate review under the Takings Clause because there was a reasonable nexus and proportionality as to the easement as a general matter. Once these concerns are met, are we so unconcerned with differential treatment by local officials that they need not even satisfy traditional rational basis review?

3. *The Old Rule Is Functional and Important*

Even acknowledging all this, a supporter of the expansion of *Engquist* could ask: compared to what? Such an objector would contend that the cases following *Olech* have not succeeded in articulating a functional jurisprudence by which to evaluate a class-of-one claim.⁹⁰ In particular, the courts have stumbled over whether or not such a claim requires evidence of subjective malice.⁹¹ Yet this is not a significant objection because an appropriate analytic structure which reflects our constitutional values is at hand, and that approach seems at least as functional as a jurisprudence based on "discretion."

Neither at the level of theory nor practice must malice be demonstrated in a class-of-one case, as was implicit in *Olech* itself. There is a good argument, as a practical matter, that malice should be required

89. See *Kelo v. City of New London*, 545 U.S. 469, 490–91 (2005) (Kennedy, J., concurring) ("This Court has declared that a taking should be upheld as consistent with the Public Use Clause, as long as it is 'rationally related to a conceivable public purpose.' This deferential standard of review echoes the rational-basis test used to review economic regulation under the Due Process and Equal Protection Clauses. The determination that a rational-basis standard of review is appropriate does not, however, alter the fact that transfers intended to confer benefits on particular, favored private entities, and with only incidental or pretextual public benefits, are forbidden by the Public Use Clause. A court applying rational-basis review under the Public Use Clause should strike down a taking that, by a clear showing, is intended to favor a particular private party, with only incidental or pretextual public benefits, just as a court applying rational-basis review under the Equal Protection Clause must strike down a government classification that is clearly intended to injure a particular class of private parties, with only incidental or pretextual public justifications." (citations omitted) (quoting *Haw. Housing Auth. v. Midkiff*, 467 U.S. 229, 241 (1984))).

90. See, e.g., Farrell, *supra* note 53, at 124 ("After the Supreme Court decided *Olech* in 2000, the Second Circuit struggled to determine how the *Olech* class of one equal protection claim relates to the Second Circuit's selective enforcement equal protection claim.").

91. Justice Breyer concurred in *Olech* specifically to point out that malice seemed to be present there and in the other lead cases, and that malice ought to be required "lest we interpret the Equal Protection Clause in this case in a way that would transform many ordinary violations of city or state law into violations of the Constitution." See 528 U.S. 562, 565 (2000) (Breyer, J., concurring); see also *Bizzarro v. Miranda*, 394 F.3d 82, 88 (2d Cir. 2005) (discussing and summarizing the issue).

because it is easier to show, as William Araiza has argued.⁹² Indeed, as Araiza has further observed, courts are especially likely to find a violation under rational basis review when they see malice, even if, strictly speaking, a possible rational basis is also at hand and, therefore, the equal protection claim should be defeated.⁹³ Even a class-of-one skeptic like Farrell believes there is place for related “selective enforcement” claims based on malice.⁹⁴ Yet, only allowing malice-type suits to proceed would be too much of a sacrifice of principle. For one, requiring malice would undermine the cases that even the *Engquist* Court thought were viable—that is, the “clear standard” cases, as *Olech* and *Allegheny* were re-conceived by the Court. The question then becomes whether these two categories are sufficient, namely “clear standard” and malice cases, and even then the answer is “no.”

Pure irrationality, even when a clear standard does not exist and there is no malice, remains intelligible (leaving aside the difficult question of what constitutes a “clear standard”). This is manifest in theory. Suppose a capricious (and lazy?) bureaucrat just flips a coin to decide whether or not I get a liquor license. This violates my right to be treated rationally and forces me to live in fear of my livelihood.

Without doubt, the lead Supreme Court cases involving equal protection and rational basis review, particularly *City of Cleburne v. Cleburne Living Center, Inc.*⁹⁵ and *Romer v. Evans*,⁹⁶ and Justice O'Connor's concurrence in *Lawrence v. Texas*,⁹⁷ show signs of being influenced by the presence of malice, just as Araiza would lead us to expect. All of these cases also involve significant individual rights, as Pam Karlan would lead us to expect.⁹⁸ But consider another famous rational basis decision, *San Antonio Independent School District v. Rodriguez*.⁹⁹ This decision stands for the proposition that there is no

92. Araiza, *supra* note 3, at 53–54.

93. *Id.*; see William D. Araiza, *Irrationality and Animus in Class-of-One Equal Protection Cases*, 34 *ECOLOGICAL L.Q.* 493 (2007).

94. Farrell makes this point in connection with the infamous speeding hypo:

To concede that underenforcement of the law is the norm, however, is not the same as to condone selective enforcement of the law because of an impermissible, bad faith motive. There is a difference between pulling over every tenth speeding car and pulling over every speeding car whose driver is black, or every speeding car that has a “Pro Choice” bumper sticker, or every speeding car that is driven by someone who recently sued the town successfully. This kind of selective, bad faith enforcement of the law can be a violation of the Equal Protection Clause.

Farrell, *supra* note 53, at 122–23 (footnote omitted).

95. 473 U.S. 432 (1985).

96. 517 U.S. 620 (1996).

97. 539 U.S. 558, 585 (2003) (O'Connor, J., concurring).

98. See Pamela S. Karlan, *Equal Protection, Due Process, and the Stereoscopic Fourteenth Amendment*, 33 *MCGEORGE L. REV.* 473 (2002).

99. 411 U.S. 1 (1973).

fundamental right to an education.¹⁰⁰ However, despite the fact that the case did not involve a fundamental right, the Texas system of local education finance that was challenged still needed to pass rational basis review.¹⁰¹ The Texas system arguably failed this test because of the gross disparities in resources available to educate students based on the happenstance of property tax base.¹⁰² In order to find this to be rational, the Court emphasized that the seeming irrationality resulted from Texas's reasonable decision to endow local governments with power over education.¹⁰³ If citizens have significant power over local boundaries and over educational revenue decisions, then significant variations are likely to result, but these variations can be justified by the rational decision to empower local decisionmaking.

This rationale had consequences more than a decade later when the Court faced an esoteric school financing question in *Papasan v. Allain*.¹⁰⁴ In *Papasan*, the Court confronted a complicated situation where, in essence, certain lands given to the State of Mississippi by the federal government for the purpose of public education were only generating revenues for the school districts in which the lands happened to be located.¹⁰⁵ The Court, speaking through Justice White (who had thought the Texas system failed rational basis review), found that the Mississippi allocation might fail rational basis review (the case was remanded) and distinguished the situation from that upheld in *Rodriguez* as follows:

This case is therefore very different from *Rodriguez*, where the differential financing available to school districts was traceable to school district funds available from local real estate taxation, not to a state decision to divide state resources unequally among school districts. The rationality of the disparity in *Rodriguez*, therefore, which rested on the fact that funding disparities based on differing local wealth were a necessary adjunct of allowing meaningful local control over school funding, does not settle the constitutionality of disparities

100. *Id.* at 35.

101. *Id.* at 44.

102. *Id.* at 68 (White, J., dissenting) (finding Texas system failed rational basis review); *see also id.* at 59 (Stewart, J., concurring) ("The method of financing public schools in Texas, as in almost every other State, has resulted in a system of public education that can fairly be described as chaotic and unjust. It does not follow, however, and I cannot find, that this system violates the Constitution of the United States." (footnote omitted)). Justice Stewart provided the fifth vote in *Rodriguez*.

103. *See id.* at 49, 53–54 (majority opinion) ("The persistence of attachment to government at the lowest level where education is concerned reflects the depth of commitment of its supporters. In part, local control means, as Professor Coleman suggests, the freedom to devote more money to the education of one's children. . . . But any scheme of local taxation—indeed the very existence of identifiable local governmental units—requires the establishment of jurisdictional boundaries that are inevitably arbitrary.").

104. 478 U.S. 265 (1986).

105. *Id.* at 272–74.

alleged in this case, and we differ with the Court of Appeals in this respect.¹⁰⁶

In other words, Justice White took seriously the “rational basis” that had been proffered in *Rodriguez* to justify the harm of differential school financing. Because the rational basis that passed constitutional muster in that case was distinguishable, he demanded a similarly sufficient rational basis in *Papasan*, despite the absence in either case of a fundamental right, the violation of a clear standard, or malice. If a rational basis had not been required in *Rodriguez*, subsequent courts would not have had a jurisprudential means of holding government officials even minimally accountable for their actions in such cases, at least not on equal protection grounds. *Rodriguez* clearly establishes, however, that even in the absence of a fundamental right, violation of a clear standard, or malice, the Equal Protection Clause demands that government officials provide a justification of their actions sufficient to pass rational basis review.

This “reason-giving” requirement, embodied in rational basis review, puts desirable pressure on all levels of government officials to remain honest. Consider, for example, the dynamic that played out between *Rodriguez* and *Papasan* with respect to reason-giving. Government officials in the later case were not permitted to rely on the reasons given in the earlier case to justify a similar harm (differential school financing) since the sources of the harms were distinguishable (in *Rodriguez*, the harm was a consequence of local control of education, while in *Papasan*, the harm flowed from the state’s location-based distribution of revenue generated from certain lands).¹⁰⁷ Therefore, under threat of equal protection liability, the defendants in *Papasan* were required to come forward on remand with specifically tailored reasons justifying the harm their financing policy had caused.¹⁰⁸

Although this dynamic occurred between cases, one can imagine the same dynamic occurring within one case—and perhaps this is what happened in *Engquist*.¹⁰⁹ Remember that Ms. Engquist maintained that

106. *Id.* at 288.

107. *Id.*

108. *Id.* at 289.

109. As discussed below, this is a concrete example of the importance of reason-giving. By requiring officials to give reasons, they are compelled to follow them in the next case or explain why the reasons do not apply. See Frederick Schauer, *Giving Reasons*, 47 STAN. L. REV. 633, 657–58 (1995). Of course, stare decisis and reasoned opinions are requirements that are similarly justified. See generally *id.* This makes sense because in the end judges, too, are government officials exercising tremendous power. Cf. *United States v. Cavera*, 550 F.3d 180, 193 (2d Cir. 2008) (en banc.) (Calabresi, J.) (“Requiring [district] judges to articulate their reasons [for sentences] serves several goals. Most obviously, the requirement helps to ensure that district courts actually consider the statutory factors and reach reasoned decisions. The reason-giving requirement, in addition, helps to promote the perception of fair sentencing. Furthermore, the practice of providing reasons ‘helps [the sentencing process] evolve’ by informing the ongoing work of the Sentencing Commission. Finally, for our own

she was dismissed for improper reasons, or, alternatively, for no reason at all.¹¹⁰ It seems entirely possible that in arguing that they had no improper reason to dismiss Ms. Engquist (to avoid her protected class claim, for example), the defendants made it much more difficult on themselves to articulate *any* reason to have dismissed her at all.¹¹¹ The defendants, perhaps, thus avoided losing on the grounds of having an improper reason, but only by setting themselves up for the argument that they had *no* reason. To be sure, the defendants could have had a proper reason, just like the defendants in *Papasan* could have, it just turned out they could not articulate one that was satisfactory. The *Rodriguez/Papasan* and *Engquist* examples demonstrate the desirability of allowing equal protection challenges to remain viable even when they do not involve malice or violations of a clear standard. Such challenges require government actors to provide reasons for their actions, which helps ensure that those actions are in fact reasonable, rather than arbitrary and abusive.

So, if equal protection challenges not based on malice or a so-called “clear standard” are to remain viable, then what should the test look like? In my view, the test should be the one that Judge Reinhardt thought governed the Ninth Circuit before *Engquist*. As the judge explained:

The plaintiff can show that no rational basis exists in a class-of-one case by showing that an “asserted rational basis was merely a pretext for different treatment.” Such pretext may be shown by demonstrating “either: (1) the proffered rational basis was objectively false; or (2) the defendant actually acted based on an improper motive.” As to the second prong, reasons that are “malicious, irrational or plainly arbitrary” cannot provide a rational basis. Thus, malice can in some circumstances serve as a basis for showing both disparate treatment and lack of rational basis.¹¹²

purposes, an adequate explanation is a precondition for ‘meaningful appellate review.’ We cannot uphold a discretionary decision unless we have confidence that the district court exercised its discretion and did so on the basis of reasons that survive our limited review. Without a sufficient explanation of how the court below reached the result it did, appellate review of the reasonableness of that judgment may well be impossible.” (third alteration in original) (citations omitted) (quoting *Rita v. United States*, 551 U.S. 338, 357 (2007); *Gall v. United States*, 552 U.S. 38, 50 (2007))).

110. *Engquist v. Or. Dep’t of Agric.*, 128 S. Ct. 2146, 2149 (2008).

111. As Justice Stevens observes, there is some evidence that this is exactly what happened. *Id.* at 2158–59 (Stevens, J., dissenting) (“Here, as in *Olech*, Engquist alleged that the State’s actions were arbitrary and irrational. In response, the State offered no explanation whatsoever for its decisions; it did not claim that Engquist was a subpar worker, or even that her personality made her a poor fit in the workplace or that her colleagues simply did not enjoy working with her. In fact, the State explicitly *disclaimed* the existence of any workplace or performance-based rationale.”).

112. *Engquist v. Or. Dep’t of Agric.*, 478 F.3d 985, 1013–14 (9th Cir. 2007) (Reinhardt, J., dissenting) (citations omitted) (quoting *Squaw Valley Dev. Co. v. Goldberg*, 375 F.3d 936, 945–46 (9th Cir. 2004); *Armendariz v. Penman*, 75 F.3d 1311, 1326 (9th Cir. 1996)). Judge Reinhardt does not focus on the hard question of whether malice alone renders a decision irrational. Judge Posner is certainly

Pragmatically, to be sure, few claims of this nature will survive summary judgment, especially given the other constraining decision rules. And of those claims, most will involve malice or a deviation from a clear standard, but not all. As Judge Leval explained of this type of claim, “an *Olech*-type equal protection claim focuses on whether the official’s conduct was rationally related to the accomplishment of the work of their agency.”¹¹³

4. *In Defense of Rational Basis*

Perhaps, though, the objection to the traditional equal protection analysis is deeper, and it is an objection to rational basis review altogether. After all, this level of review is so deferential that few government actions will fail—why bother governments with these cases at all? The import of cases like *Cleburne*, *Romer*, and *Plyler v. Doe*¹¹⁴ should provide some indication that this kind of review can be important, but these cases are often viewed as surreptitiously applying some kind of more stringent rational basis review.¹¹⁵ Yet even if it were correct that

right that it does not; officials are people and they are certainly entitled to feelings of anger and frustration with difficult individuals or institutions, but what they cannot do is act against such people only out of such feelings. See *Bell v. Duperrault*, 367 F.3d 503, 713 (Posner, J., concurring).

113. *Bizzarro v. Miranda*, 394 F.3d 82, 88–89 (2d Cir. 2005).

114. 457 U.S. 202 (1982).

115. See, e.g., Farrell *supra* note 5, at 415 (“This search for an underlying principle that would explain the results in the heightened rationality cases appears to be unsuccessful. Rather, it appears that the Court, without explanation, decided in a particular case to use heightened rationality and thus the claim succeeded. The Court then proceeded to ignore that case in the future.”); see also *Bell*, 367 F.3d at 710 (Posner, J., concurring). The notion that these cases rely on something other than rational basis review seems to rely most of all on the (reasonable) surmise that if these cases represented ordinary rational basis review, then the principles on which they rest could be articulated and applied. To be sure, this is how cases should usually be decided, especially those chosen for review by the Supreme Court. Nevertheless, it has long been understood that justice cannot always be reduced to general principles, which is why justice is more than law, but also includes equity. Equity means many things but it has always been associated with particularized justice. See generally Darien Shanske, *Revitalizing Aristotle’s Doctrine of Equity*, 4 LAW CULTURE & HUMANITIES 352 (2008) (emphasizing role of practical wisdom on the part of judges in deciding equitably); Darien Shanske, Note, *Four Theses: Preliminary to an Appeal to Equity*, 57 STAN. L. REV. 2053 (2005) (surveying equity tradition). It would be anomalous if the Supreme Court, which is a court of equity, U.S. CONST. art. III, § 2, cl. 1, should be prevented in the odd case from rendering particularized justice. This is all the more true given the fact that (1) Court decisions need to be a matter of consensus; and (2) poorly considered general principles can do more harm than good, even if the decision is correct—this is arguably the case with the general musings from *Engquist*. A clearly individualized decision about the category of public employment would have caused much less mischief. This may suggest a paradox, namely that a rational basis decision need not be as general in its reasoning as the government decisions under review in these cases, but the paradox is illusory. The nature of equity is itself a reason why not all judicial decisions are generalizable in the same way, and the facts of the individual cases indicate why they were the correct decision in that case (e.g., disallowing animus against immigrant children in *Plyler*) even if this reasoning cannot be generalized according to standard categories used in American jurisprudence (e.g., refusing to make the disabled into a protected class in *Cleburne*). If a government official can make a case as sound as the Court did in its equitable rational basis decisions, then clearly that government decision will survive rational basis review, and it should.

virtually no plaintiff would ever win if a true rational basis test were applied, then there are independent arguments for not wiping out the class-of-one cause of action.

In short, the importance of the exercise of reason-giving should not be gainsaid, even if the reason given will generally be sufficient to defeat the claim of the plaintiff. Versions of this argument emerge from a variety of disciplines and perspectives, including our own constitutional history. It is axiomatic that republicanism was a dominant strain of thinking among the founders and that this tradition in political theory was particularly concerned with the arbitrary exercise of government power.¹¹⁶ A government official who can deny or revoke a powerful privilege without so much as a reason would seem to be the very picture of arbitrariness:

Being unfree does not consist in being restrained; on the contrary, the restraint of a fair system of law—a non-arbitrary regime—does not make you unfree. Being unfree consists rather in being subject to arbitrary sway: being subject to the potentially capricious will or the potentially idiosyncratic judgement of another.¹¹⁷

Worse than merely arbitrary, a government official acting in such a manner literally dominates the governed to the extent that they are subject to his or her whim, and this whim cannot be meaningfully contested. This does not go only for major issues, but minor ones.¹¹⁸ One is not free in this rich republican sense if one is living in fear of petty “offenses.”¹¹⁹

Even contemporary political theorists who discount the relevance of republicanism to our modern polity strongly emphasize the import of impersonal execution of the law.¹²⁰ It is central to both our economic and political systems that all are guaranteed equal access. One need not spin out my initial hypothetical very far to see this point. Suppose the mayor is denying me a liquor license to protect my competitor; this kind of political shield from competition is manifestly a drag on our economy. Conversely, now suppose that I am being denied the license because I was a vocal supporter of the mayor’s political opponent; the central

116. The recent classic on republicanism is PHILIP PETTIT, *REPUBLICANISM: A THEORY OF FREEDOM AND GOVERNMENT* (David Miller & Alan Ryan eds., 1997), upon which these next few sentences are based. On the republican tradition, see *id.* at 18–35.

117. *Id.* at 5.

118. *Id.* at 52, 55, 183–85 (discussing a definition of domination which includes arbitrariness and the connection between contestability of public decisions and nonarbitrariness).

119. *Id.* at 195–96.

120. Compare DOUGLASS C. NORTH ET AL., *VIOLENCE AND SOCIAL ORDERS: A CONCEPTUAL FRAMEWORK FOR INTERPRETING RECORDED HUMAN HISTORY* 194–97 (2009) (arguing that the republican tradition was backwards looking and did not anticipate the revolutionary economic and political developments of the nineteenth century), with *id.* at 154–58, 265–66 (emphasizing import of rule of law, particularly the impersonal provision of government services).

competitive mechanisms of our political system are undermined when there is no rule of law.

There is no need here to belabor this point. The jurisprudential, historical, and theoretical arguments for requiring reason-giving are well-known and currently part of our law.¹²¹ The Court's confused dicta in *Engquist* itself provides no good reason to slide away from this.

5. *Why This Dicta Is Bad for Local Governments*

Clearly the rule I am advocating, and the rule I believe is currently the law, is better for plaintiffs, though only slightly. It will only help an actual plaintiff win a case in rare egregious situations. Nevertheless, it is not viable to insist that the Equal Protection Clause provides not one iota of protection to an individual interacting with government on a matter left to the government's discretion.

Still, one argument for the expansion of *Engquist* is that it is more protective of state and local governments. Most plaintiffs will still lose under the old rule of *Olech*, but presumably more will try than under the harsh new regime of expanded *Engquist*, tying up governments in litigation. No doubt one of the polestars of § 1983 doctrine has been balancing the need to protect the public fisc and also to empower government officials to show initiative in solving problems. As to the handful of egregious cases that may arise, there is a good argument to be made that extraordinarily arbitrary actions aimed at an individual are likely to offend against some other provision of either the state or federal constitution, federal or state civil rights law, or federal or state administrative law. It is also surely true that governments should not be assumed to be bad actors.

To respond: First, the contingent availability of these other remedies should not limit the reach of one of the most basic constitutional protections, if only because of the strength of the arguments as a matter of general political theory for everyone to be able to turn to the Federal Constitution for at least a minimal level of rationality. Second, we have seen that there are many cases, such as that involving a local liquor license, where it is not certain, at least to this observer, that a plaintiff has additional remedies. Third, even the expanded *Engquist* discretion rule

121. Recently, Glen Staszewski summarized the traditional arguments for reason-giving as follows:

First, reason-giving promotes accountability by limiting the scope of available discretion and ensuring that public officials provide public-regarding justifications for their decisions. Second, reason-giving facilitates transparency, which, in turn, enables citizens and other public officials to evaluate, discuss, and criticize governmental action, as well as potentially to seek legal or political reform. Most fundamentally, reason-giving fosters democratic legitimacy because it both embodies, and provides the preconditions for, a deliberative democracy that seeks to achieve consensus on ways of promoting the public good that take the views of political minorities into account.

Glen Staszewski, *Reason-Giving and Accountability*, 93 MINN. L. REV. 1253, 1278 (2009).

would be costly because it would be so hard to administer. Many of the same cases would be brought and more confused jurisprudence of discretion would be created. And this is on top of the fact that plaintiffs are unlikely to *just* bring a class-of-one suit, which is to say that the expansion of *Engquist* promises a false economy if, as in the case of Ms. Engquist herself, plaintiffs are likely to sue local governments on many different theories.

Finally, and most importantly, the fact that governments should be presumed to be good actors can be seen as pointing the other way. It is no disrespect to governments to note that their employees are often working under a lot of pressure and often with limited resources. As good actors trying to do their jobs, they need to be directed to what it means to do one's job properly as a government employee.

This final point can be recharacterized as following from the well-worn paradox of autonomy. The ability of one person to do an act is often a disability to another person, either to do that act or some other. This is obviously true as to the government regulator and the regulatee in cases like *Olech* or *Esmail*. The government's ability to deny my liquor license is a disability for me. This dynamic holds true within the bureaucracy as well; the "discretion" of one regulator to act without giving reasons serves as a gravitational pull on other regulators who would otherwise feel themselves constrained by the time-consuming and perhaps risky practice of reason-giving. Think of the task of an agency's counsel who, in response to an agency practice of giving imperious conclusions to applicants, advises that more transparent procedures and fuller explanations are required. It helps all but the (few) bad actors for the counsel to be able to say that the law requires clear procedures and public explanation because all decisions must be at least minimally justifiable.

A decision like *Olech* thus really stands for the uncontroversial proposition that governments should have an orderly and transparent process when dealing with citizens. The government is not in fact a private business. If I find that my bank is wholly incapable of keeping track of my records and of treating my account the same way as those of others, then I can switch banks. A citizen who requires a license to operate his business is not in the same position because the government (properly) has a monopoly, which is the main reason why the government must be subject to different and stiffer controls (like other monopolies, only more so). In the chaos of running a government bureaucracy, it is easy to forget the difference. Sometimes a law that seems to harm an interest actually helps it. I suggest that the current law helps focus the mind of well-intentioned employees and discipline those inclined to go too far, and thus that an extended version of *Engquist*

would tend to bolster the force of entropy, resulting in less good government, not more.

CONCLUSION

I have argued that *Engquist* should mean only what it says, namely that a certain type of equal protection claim in the public employment context is not viable. I have explained my reasons, including the fact that the status quo is just fine. But the most important reason relates to constitutional values; it is one thing to limit claims under the Equal Protection Clause pragmatically, but quite another to deny categorically, as a matter of federal constitutional law, that citizens have a right to a day in court when they are most at risk of arbitrary treatment from government officials.